Headquarters U.S. Air Force

Integrity - Service - Excellence

LEGAL 101
Closing and Post-closing
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AFHPCE (SAF/GCN-RPO)

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Overview

- Projects, status, and stakeholders
- Background and authorities
- Document drafting
- Closing the deal
- Post-closing transactional issues
- Issues and challenges

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Military Housing Privatization Initiative (MHPI)

- **Authorized by National Defense Authorization Act of 1996**
- **Designed to help improve the quality and quantity of military housing through public/private partnerships**
- **Provides several authorities to help finance the development and ongoing management of military housing projects**

FY 98 - 00 Family Housing Privatization Pilot Projects

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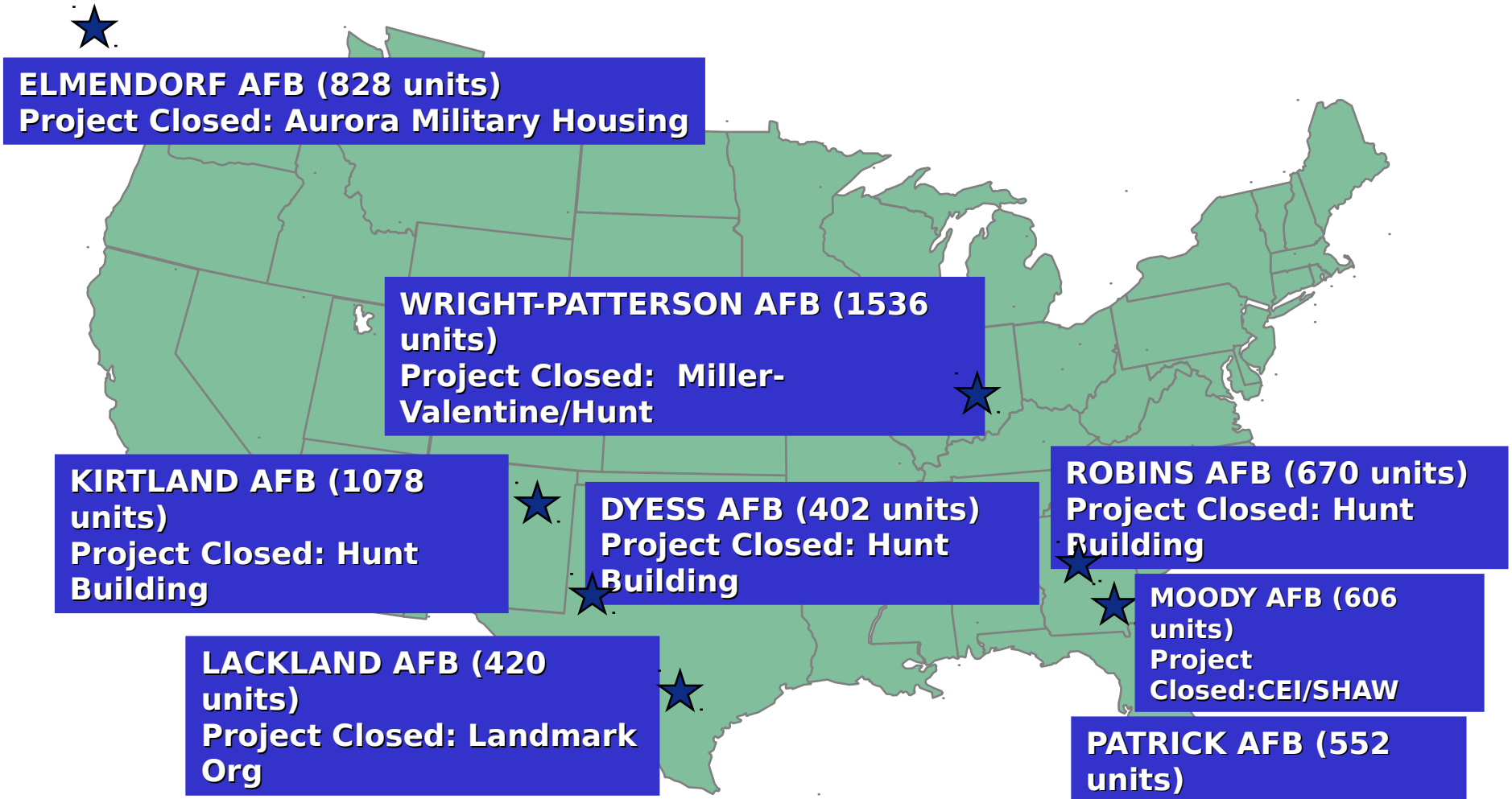

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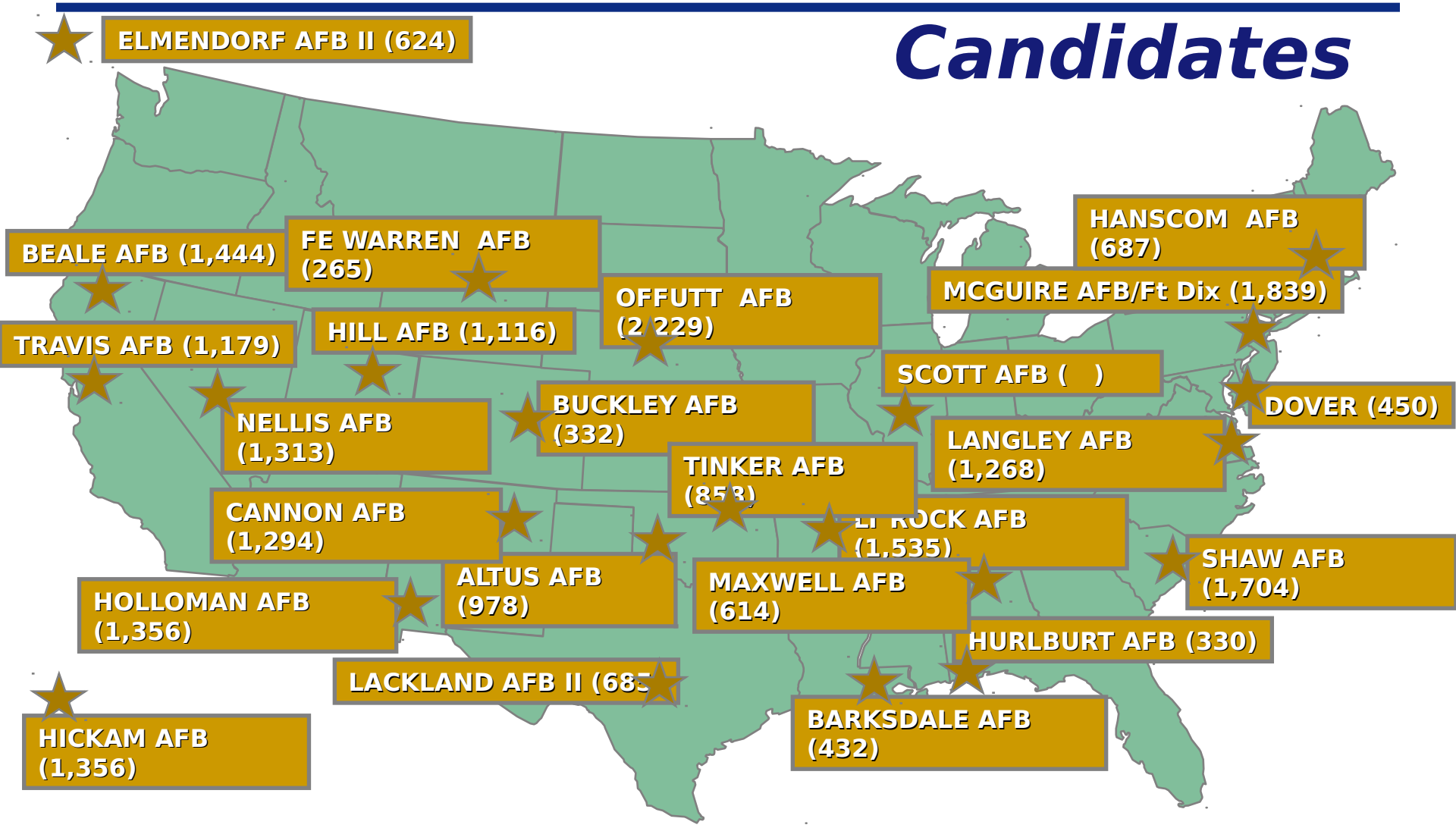
Family Housing Privatization FY01-03 Candidates



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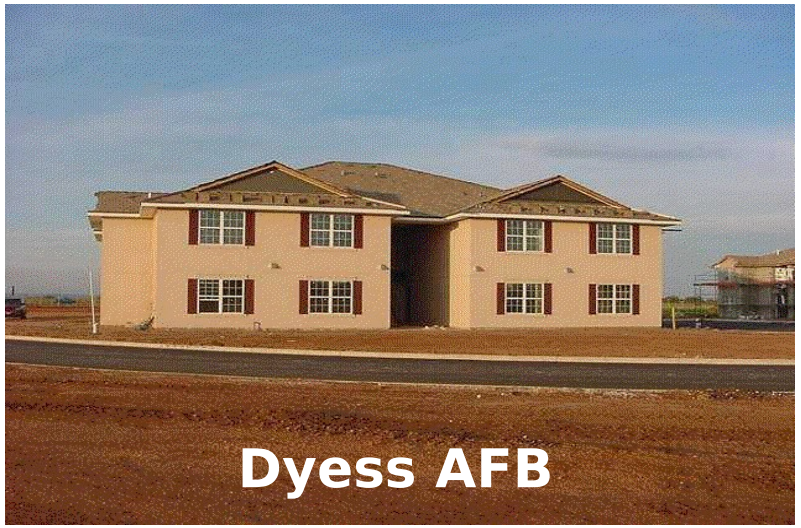
Privatized Housing Construction



Stakeholders

HOUSING IS PERSONAL

- ***The Military Member and Family***
- ***The Wing Commander***
- ***The MAJCOM***
- ***Air Staff***
- ***Secretary of the Air Force***

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Stakeholder - The Military Member & Family

- **Requirement: safe, affordable, comfortable, well maintained housing**
- **Concerns with privatization:**
  - **Location**
  - **Unit size and quality**
  - **Security**
  - **Community assets/amenities**
  - **Good landlord-tenant lease agreement**
  - **Avoid out-of-pocket expense (OOP)**

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Stakeholder -The Wing Commander

- **Requirement: safe, affordable houses**
- **Concerns with privatization:**
  - **Perception of a complete loss of control**
  - **Must meet housing requirements**
  - **Must be as good or better than traditional military family housing**
  - **Must preserve a sense of military community**
  - **Post-award issues. Needs ongoing interface over quality, security, and tenant concerns. Ensure compliance with agreement**

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Stakeholder -The Major Command

- **Requirement: develop and execute the command's housing program. The "owner" of each project from inception through initial occupancy.**
- **Concerns with privatization:**
  - **Financial soundness of the deal**
  - **Predictable, executable solicitation process**
  - **Minimization of required resources**
  - **Ability to forecast and program for requirements -- no surprises**

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Stakeholder -The Air Staff

AF/ILEHM (Mr. Bob Moore)

- Overall management responsibility
  - Provide operational guidance
  - Provide interim approval, coordinate and guide projects through SAF approval
  - AFCEE is the Air Force Housing Privatization Center of Excellence (AFHPCE) – the Air Force's preferred method of implementation

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Stakeholder - The Air Force Secretariat

SAF/IEI (Mr. Fred Kuhn)

- **Oversees Air Force housing privatization**
- **Is Air Force signatory authority**
- **Establishes Air Force policy re: execution and administration**
  - **In compliance with law, Congressional guidance, DoD policy & applicable regulations**
- **Concerns:**
  - **Protection of Air Force assets and resources**

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AFCEE Role in Housing Privatization

- **AFCEE named Housing Privatization Center of Excellence in 1999**

- **"Execution responsibility for the Housing Privatization program, including legal, financial management, engineering design and construction, and property management activities is centered at AFCEE." - *24 Aug 00 AF/IL & SAF/MI ltr***

- **AFCEE Vision--**
  - **Full service capability**
  - **Cost effective**
  - **Meet commitments**
  - **Easiest agent to work with**

Background

- Traditional Source Selection – perceived as expensive and slow
- Effort to introduce reasonable commercial practices
- Evolving/learning process

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Primary Legislative Authorities

Real Estate Related

- Conveyance or Lease of Property
- Guarantees
- Rent and Occupancy Guarantees
- Differential Lease Payments
- Ancillary Supporting Facilities

Financing Tools

- Direct Loans
- Partnership Interest

Government Investment Vehicles

- Acquisition of Loan
- Rental Payments by Allotment

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Housing Privatization Authority

- National Defense Authorization Act for 1996
  - 10 U.S.C. § § 2871 - 2885
  - Wide range of authorities
  - Intended to encourage experimentation
  - These authorities were extended to December 31, 2004 by the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398, Section 2806)
    - Agreements entered into prior to that date can be fulfilled

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General Authority (10 U.S.C. § 2872)

- Acquisition or construction by private persons of family housing units
- On or near military installations within U.S. territories and possessions
- May or may not involve the transfer of Air Force-owned property

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Sources of Housing

- New
  - Build/Lease (10 U.S.C. § 2874)
- Existing
  - Currently AF owned (10 U.S.C. § 2878)
    - "Appropriate" consideration as determined by the Secretary of the Air Force
    - Must have suitable preference for military members
  - Currently privately owned (10 U.S.C. § 2872)

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Market Incentives

- Financial Assistance
  - Loans / Debt (§ 2873) vs. Investment / Equity (§ 2875)
- Loan Guarantees (§ 2873)
- Rental Guarantees (§ 2876)
- Differential Lease Payments (§ 2877)
- Transfer of Government Property (§ 2878)

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Equity Financing (10 U.S.C. § 2875)

- Limited partnership interest
  - Limited Liability Corp.
    - Not mentioned in statute, but has been used
- Purchase of Stock or other interest in entity
- Amount of Contribution Limited
  - 1/3 of the capital cost of the project; or
  - 45% of the capital cost if investment includes conveyance of land or facilities
- Collateral Incentive Agreement Required
  - Ensures preference for military and families
- Congressional Notification Required

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Direct Loans (10 U.S.C. § 2873)

- NOT Grants
  - MUST be repaid
- Terms set by Secretary of the Air Force
  - Must protect interests of U.S.
- Can be Primary or Subordinate Loan
- No construction loans
- Amount Limited to Budget Authority
  - OMB Scoring

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Loan Guaranty (10 U.S.C. § 2873)

- **Amount Limited**
  - **Budget Authority (OMB Scoring)**
  - **Lesser of:**
    - **80% of project value; or**
    - **Outstanding principal of the loan**

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Available Legal Resources

- **Air Force**
  - **AFHPCE (SAF/GCN-RPO) Legal Counsel**
  - **Air Force Real Property Agency (AFRPA) Counsel**
  - **Installation Staff Judge Advocate**
  - **Major Command Staff Judge Advocate**
  - **AFCESA (Utilities)**
  - **SAF/GCQ (Acquisition Law)**
- **Non-Air Force**
  - **Attorneys retained by PSC for own purposes**
  - **Attorneys retained by PSC at Air Force Direction**

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Relationship With Gov't Lawyers

- Government Counsel must perform "inherently governmental" tasks
- All transactional documents must be reviewed and approved by Government counsel in advance
- Outside legal counsel (PSC retained or direct) must be approved by SAF/GC in advance
- AFHPCE (SAF/GCN-RPO) Legal Counsel - central source for answers and "cross-feed"

What Is "Inherently Governmental?"

Guidance - FAR Part 7

- Inherently governmental functions normally fall into 2 categories: (1) the act of governing, and (2) monetary transactions and entitlements
- Services/functions not considered inherently governmental
  - Evaluation of another contractor's performance
  - Support of acquisition planning
  - Assistance in contract management
  - Technical evaluation of contract proposals
  - Advising source selection boards
  - Voting member of source evaluation board
- Determination made by agency issuing solicitation

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Document Drafting

- Real Estate Documents
- Financing Documents
- Administration/Management Documents

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Transaction Closing

- Privatization Support Contractors arrange and manage closings with Air Force approval
- “Pre-closings” encouraged
- Develop detailed closing checklists
- Ensure that all documents as approved by Air Force are fully executed by authorized parties
- Develop detailed disbursement memoranda
- Ensure that opinion letters are complete and dated as of closing date
- Ensure that documents are recorded by appropriate parties

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Lackland Transaction Closing

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Loan Closing

- Occurs when requirements of Forward Loan Commitment are met
- Parties execute pre-approved loan documents (Note, etc.)
- “Pre-closings” encouraged
- Develop detailed loan closing checklists
- Ensure that all documents as approved by Air Force are fully executed by authorized parties
- Develop detailed disbursement memoranda
- Ensure that all required documents are complete and dated as of closing date
- Ensure that documents are recorded by appropriate parties

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Loan Funding

- **May occur simultaneously with Loan Closing**
- **“Pre-closings” encouraged**
- **Develop detailed loan funding checklists**
- **Ensure that all documents as approved by Air Force are fully executed by authorized parties**
- **Ensure that all required documents (e.g. certificates, title insurance updates) are complete and dated as of funding date**
- **Develop detailed disbursement memoranda and DFAS instructions**

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Post Closing Transaction Issues

- Ensure that original recorded documents are handled in accordance with Air Force Instructions or, if not specified by Air Force Instructions, by Air Force protocol approved prior to closing
- Provide executed and recorded photocopies of closing documents in indexed closing binders (with Table of Contents) as required by particular transaction
- Provide post-closing guidance to Portfolio Manager and to others associated with administration of the property and enforcement of the documents

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Current Legal Issues

- Ongoing development of standard documents
- FAR v non-FAR
- Appropriate use of limited liability companies
- Jurisdiction
  - Fire/police protection
  - Landlord-tenant disputes
- Property Taxes: trade-off with jurisdictional issues
- Permissible creative financial structures
- Ancillary support facilities
- Military Personnel & Civilian Employees Claims Act
- Applicability of Davis-Bacon Act

Questions?

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